Supreme Court of the United States

OCTOBER TERM, 1953

No. 69

JOE VALDEZ GONZALES,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

INDEX

Subject Index

Cases Cited

STATUTES AND REGULATIONS CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No.

JOE VALDEZ GONZALES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming the judgment of the United States District Court for the Eastern District of Michigan convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It appears in the record. [98a][1] A memorandum opinion of the district court also appears in the record. [81a-92a]

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1954. [97a] This petition for writ of certiorari is filed within 30 days of the date of such judgment. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).—See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

I.

Section 6(j) of the Universal Military Training and Service Act states that a registrant who, because of religious training and belief, is opposed to combatant and noncombatant training and service in the armed forces, shall be exempted from such training and service and be classified as a conscientious objector. The act does not make belief in self-defense or willingness to defend oneself a basis for a denial of the conscientious objector status. The Court of Appeals, as a basis for affirmance, found that petitioner's willingness to use force in self-defense was a basis in fact for the denial of the conscientious objector status.

A question presented, therefore, is whether petitioner's willingness to defend himself and his Christian brothers by the use of force in event of attack is basis in fact for a denial by the Selective Service appeal board of the conscientious objector classification claimed by petitioner.

[1] **Numbers appearing herein within brackets refer to pages of the printed record in this case.**

II.

Section 6(j) of the act and Section 1626.25 of the Selective Service Regulations provide for the reference of the conscientious objector claim to the Department of Justice for appropriate inquiry and hearing. This is followed by a recommendation by the department to the appeal board on the conscientious objector claim. Petitioner had a hearing, after inquiry, that was followed by a report of the hearing officer to the Department of Justice and a recommendation by the Assistant Attorney General to the appeal board. The department found petitioner to be a sincere and bona fide member of Jehovah's Witnesses, but it recommended against the conscientious objector status. The reason was because of the shortness of the time petitioner had been one of Jehovah's Witnesses. It said that failed to establish that his conscientious objections were deep-seated or old enough to entitle him to the exemption. The appeal board followed the recommendation. The Court of Appeals held that petitioner was too late in becoming a conscientious objector and, therefore, this was proper basis in fact for a denial of the conscientious objector classification.

A question presented, therefore, is whether a sincere and bona fide member of a religious group having religious objections to performance of military service may be denied his conscientious objector status under the act and the regulations for the reason that he is a recent convert and his conscientious objections are not old enough because they were acquired shortly before his registration under the draft law.

III.

Section 6(j) of the act provides for the classification of registrants as conscientious objectors who, because of religious training and belief, are conscientiously opposed to direct participation in training and service in the armed forces. The draft board file of petitioner showed that while he was conscientiously opposed to direct participation in

the armed forces he was willing to work and did work in the crating department of a steel mill in Detroit engaged in defense work.

While the Department of Justice did not place any weight on his willingness to do this work in the defense plant, the local board and the trial judge did consider this as a basis for the denial of the conscientious objector status. The Court of Appeals affirmed the conviction also for the reasons stated by the trial court in its memorandum. These reasons of the trial judge included his willingness to work in a defense plant as basis in fact for the denial of the conscientious objector claim.

A question presented, therefore, is whether the act and the regulations permit the draft boards or the courts to deny the conscientious objector status because the objector to direct participation in the armed forces is willing to work in a defense plant that might be held to be indirect participation in the war effort.

IV.

The undisputed evidence showed that petitioner had conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based on his sincere belief in the Supreme Being. The file established without dispute that his obligations were superior to those owed to the state or which arose from any human relation. There was no showing that these beliefs flowed from any political, philosophical or sociological views. The undisputed evidence showed that the objections were based solidly on the Word of God and the obiigations that Gonzales had to the Supreme Being. The question here presented, therefore, is whether the denial of the claim for classification of petitioner as a conscientious objector was without basis in fact and, consequently, the final I-A classification was arbitrary and capricious.

V.

The draft board file showed that Jehovah's Witnesses, of whom petitioner is one, leave it up to each individual member to say whether he will or will not enter the armed forces and directly participate in the war effort. The record shows that petitioner made his choice and exercised his conscientious objections or showed that he is opposed to direct participation in the armed forces. The Court of Appeals erroneously held that, because some others of Jehovah's Witnesses have the right to choose to go into the armed forces, such was basis in fact for holding that petitioner was not a conscientious objector.

The question presented, therefore, is whether the fact that some members of Jehovah's Witnesses may choose to enter the armed forces and have done so may be considered as a basis in fact for the denial of the conscientious objector status to petitioner, notwithstanding that he sincerely believes in the tenets of Jehovah's Witnesses against direct participation in the armed forces to such an extent that he cannot participate in the armed forces.

VI.

Section 1(c) of the Universal Military Training and Service Act provides that the system of selection by draft boards shall be "fair and just." Section 6(j) provides for the appropriate inquiry and hearing of conscientious objector claims on appeal. Section 1626.25 of the regulations provides for a recommendation by the Department of Justice to the appeal board to give consideration to the recommendation of the Department of Justice and determine the classification of the registrant claiming classification as a conscientious objector. No opportunity to answer the recommendation is given to the registrant. The consideration of the document is ex parte and the use of it is entirely behind the back of the registrant before and when the final classification is made by the appeal board.

The question presented, therefore, is whether petitioner

was denied his rights to procedural due process of law contrary to the act and the Fifth Amendment to the Constitution, when the appeal board considered and acted upon the adverse recommendation against petitioner without first giving petitioner an opportunity to answer the recommendation.

STATUTE AND REGULATIONS INVOLVED

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V) § 451(c)) provides:

> "The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

Section 6(j) of the act (50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86) provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose

claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu

of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86.

Section 12(a) of the act (50 U. S. C. App. (Supp. V) § 462(a)) provides:

"... Any ... person ... who ... refuses ... service in the armed forces ... or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title ... shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a

fine of not more than $10,000, or by both such fine and imprisonment . . . ."

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14 (1951 Rev.)) provides:

> *"Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.* (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces."

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25 (1951 Rev.)) provides:

> *"Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:
>
> "(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class.

If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

"(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-O, but does find that the registrant is eligible for classification in Class I-O, it shall place him in that class.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless

in the "Minutes of Action by Local Board and Appeal Board" on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraphs (2) or (4) of paragraph (a) of this section.

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS

Form No. 191) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26 (1951 Rev.)) provides:

"*Decision of Appeal Board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

STATEMENT

The Facts

Petitioner was born July 22, 1931, at San Antonio, Texas. [35a] He registered with Local Board No. 95, Wayne County, Michigan, at Detroit, on January 4, 1950. [34a] A classification questionnaire was mailed to him on February 28, 1951. [34a] He answered the questionnaire and returned it to the board on March 9, 1951. [35a]

He gave his name and address. [36a] In Series VI he

stated he was a minister of religion and that he regularly and customarily served as such. He stated he had been a minister of Jehovah's Witnesses since February 19, 1950. He stated he had been formally ordained on February 19, 1950. [37a]

In Series VII he stated that he was married and lived with his wife and that they were married at San Antonio on September 27, 1948. [37a] He showed that he was employed by the Great Lakes Steel Corporation and devoted 40 hours per week to this work. [37a-38a]

In Series X he said he had completed 8 years of elementary education and 2 years of high school, but was not graduated from high school and that he had received private instruction and Bible training by H. Graffis from November 19, 1949, to October 1, 1950. [38a]

He signed Series XIV showing that he was conscientiously opposed to participation in war and desired to be furnished the special form for conscientious objector. [39a]

On page 7 of the questionnaire, under "Registrant's Statement Regarding Classification," he requested the local board to classify him as a regular or ordained minister of religion. [39a]

In response to the request contained in Series XIV of the questionnaire certifying that he was a conscientious objector, the local board mailed to him on March 27, 1951, the special form for conscientious objector. [40a] He answered the questions therein and on April 2, 1951, returned it to the local board, after having signed series I(B) showing he was opposed to both combatant and noncombatant military service. [42a-47a]

In the special form he answered that he believed in the Supreme Being. [43a] He said that his duties to the Supreme Being were superior to any duties he owed as a result of any human relationship. He said he believed his obligations to the Creator were higher than those owed to the state. He relied on the Ten Commandments and the Bible. He believed in the love of God and the love of neigh-

bor. He added that anything that caused him to violate any of God's commandments he could not do. [43a] He stated that he had learned his conscientious objections as a result of intensive Bible study. [43a-44a]

He stated that P. C. Truscott was the presiding minister of the congregation that he customarily attended. He relied entirely on the knowledge of the Bible for the basis of his belief. [46a]

He gave references of persons who could corroborate his stand as one of Jehovah's Witnesses and who could certify that he was a conscientious objector. He then signed the form. [47a]

The local board considered the questionnaire and the special form and on April 10, 1951, classified him in III-A as a married man. [40a] This classification made it unnecessary for the board to consider his claim for exemption as a minister. It signified, however, that the board had bypassed his conscientious objector form. [40a] On April 25, 1951, the local board notified petitioner of the classification. [40a]

On May 7, 1951, Gonzales filed a request for a personal appearance to discuss his classification. On May 15, 1951, the board decided not to grant the personal appearance but rather to send his file to the appeal board, according to a notation in the margin of the letter requesting the appearance. On May 16, 1951, the local board forwarded the file of Gonzales to the appeal board on its own motion. [49a-50a] The appeal board affirmed the III-A classification on June 12, 1951. [40a, 50a] Notice of this was sent to him on June 15, 1951. [40a]

He remained in the classification of a married man until January 8, 1952. On that date he was placed in Class I-A by the local board and so notified. [40a] On January 16, 1952, petitioner requested a personal appearance. [50a] The local board set January 29, 1952, for the hearing [40a, 51a], which was first postponed to February 4, 1952, and

then adjourned because of a lack of a quorum to February 12, 1952. [40a, 51a]

On February 12, 1952, a personal appearance was conducted. A stenographer was present and made a transcript of the hearing. [40a, 52a-60a] The memorandum of the personal appearance showed that Gonzales was ordained in February 1950. [51a] He testified that he became a full-time pioneer minister on October 1, 1950. He said: "I give 100 hours per month or about 1200 hours per year to ministerial activity." [51a, 53a]

He pointed out that working 40 hours per week did not interfere with his ministerial duties and the reason he did not quit Great Lakes Steel Corporation was because it did not interfere with the performance of his full-time pioneer ministry. [53a]

He stated he based his conscientious objections upon the teachings of the Bible that "We should not kill and should love our neighbors as ourselves." [54a] He said he did not have a certificate of ordination but that his ministry was proved by the hours he worked and the knowledge he had of the Bible. He said he was the advertising servant for the Downtown Unit of Jehovah's Witnesses in Detroit. He then added that he had a regular parish or personally assigned territory where he preached. [55a-56a] He showed he had a congregation and place of meeting and that he preached in various places in the homes of the people, as well as the hall where the ministry school is conducted. [55a-56a]

He stated he was employed at the Great Lakes Steel Corporation on the midnight shift because he had put his "minister's duties first" and that if he could not put them first he would have to get another job. He said the Great Lakes Steel Corporation "worked it out for me." [56a]

He informed the members of the local board that he had attended a regular Theocratic Ministry School where he prepared himself for the ministry. He stated that it is not a school of theology, but rather a school where the Bible is

taught. He referred to the text book, *Theocratic Aid to Kingdom Publishers.* [56a-57a]

He answered that the Great Lakes Steel Corporation manufactured some articles that are used in war. He said that did not have any bearing on his belief any more than his paying an income tax. He said he would not assist a person injured in battle. When asked why he helped the war effort by working in a defense plant he stated he had to make his living some way. Even if he raised pigs, he said, he would be doing the same thing when he paid his income tax. He said he did not know where the money went and that it was not his business. He said by working and paying income taxes he was rendering to Caesar the things that were Caesar's. [56a-58a]

He was asked if he would be willing to fight for Caesar. He said he would not give his life to Caesar because it did not belong to Caesar; it belonged to God who gave it. He could obey only those laws of man that are not against God's commands. The judge of what belongs to God and what to Caesar was God's Word, the Bible. He said he would determine what he should do by using the Word of God. [58a]

He asked permission to call before the board the presiding minister of his congregation, Paul Truscott, to verify his testimony that he was a pioneer full-time minister. The board assured him that since he had made these statements under oath, "we do not doubt it." [59a]

The local board made no decision on February 12. It did so at a later date and on February 19, 1952, it classified petitioner in I-A. [40a]

On February 19, 1952, the local board ordered him to report for armed forces physical examination on February 28. [40a, 60a-61a] On February 20, Gonzales appealed to the appeal board. The appeal was filed on February 25. [40a, 61a] On February 28, he appeared for the examination and on April 8, he was mailed a certificate of acceptability. [41a, 61a-62a] His file was forwarded to the appeal board on April

8, 1952. [40a] On April 14, 1952, the State Director of Selective Service transmitted the file to the appeal board. [62a-64a]

On June 6, 1952, the appeal board, having determined that petitioner should not be classified in I-O or in a class lower than I-O, forwarded the file to the United States Attorney under the provisions of Section 1626.25 for advisory recommendation by the Department of Justice. [41a, 64a-66a]

After the file was forwarded to the Department of Justice an extensive FBI investigation was conducted. [66a-68a] This was followed by a reference of the file to a hearing officer of the Department of Justice. The hearing officer notified petitioner to appear before him on August 5, 1952, for a hearing on the sincerity of his conscientious objections. [11a-12a]

The hearing officer, John C. Ray, was called as a witness and testified in behalf of the Government in the court below. [10a-20a] He identified the report made by him of the hearing and mailed to the Department of Justice. [11a-12a] The hearing officer's report was read into the record. [11a-16a]

The FBI report showed that petitioner was "well regarded in the several communities in which he has lived and that he and his wife are said to be very religious." [13a-14a] They held Bible studies in their home and devoted considerable time to religious work. The investigation of the FBI disclosed that he was "a devoted member of the sect and applies himself earnestly to his religious work" [13a-14a]; that he served as advertising servant and supervisor of the distribution of the religious magazines for the congregation with which he was associated; and that from February 1950 to September 1950 he "worked at least twenty hours each month doing public preaching; distributing literature, conducting Bible studies and making 'back calls' [on] interested persons." [14a] The report showed that Gonzales thereafter became a pioneer or full-time minister of Jehovah's Witnesses. [14a] As such he was required to put in a

minimum of one hundred hours monthly to religious work. [14a]

The hearing officer found that Gonzales "appeared to be a sincere Jehovah's Witness and as such is conscientiously opposed to war. He refuses combatant and noncombatant service and claims classification as an ordained minister by virtue of his baptism in the Jehovah's Witnesses sect in February, 1950. As is customary with Jehovah's Witnesses, registrant claimed that his regular bread-earning work was merely an avocation and that his ministry was his true vocation. Besides his claim of being a minister, registrant also alternatively claimed to be a conscientious objector. He disclaimed being a pacifist and under certain circumstances, if attacked, he would defend himself and members of his family to the point of taking life." [15a]

The hearing officer concluded that although Gonzales was a full-time minister, "his affiliation with the sect has been too recent to warrant acceptance thereof as a deep-seated conviction. Until the fall of 1949 he was a Catholic and his conversion to the Jehovah's Witnesses is too closely related to his selective service status to be accepted yet as genuine." [15a] The hearing officer recommended against both the ministerial and conscientious objector classifications. He suggested I-A classification. [15a-16a] His report was mailed on August 11, 1952, to T. Oscar Smith, Special Assistant to the Attorney General, Washington, D. C. [16a]

The hearing officer testified at the trial. [10a-20a] He said that Gonzales gave the usual grounds given by others of Jehovah's Witnesses as basis for his claim as a conscientious objector, making the usual Biblical quotations [17a]; that Gonzales had applied himself to his belief [17a]; and he got the impression that Gonzales was a sincere Jehovah's Witness. [18a-19a] He based his denial of the conscientious objector claim to Gonzales solely on the fact that petitioner's "conversion to the Jehovah's Wit-

nesses is too closely related to his selective service status," since petitioner had been a Catholic until the fall of 1949. [15a, 19a-20a]

When asked whether a person "could not be a conscientious objector today because he was not yesterday?" the hearing officer refused to answer. [19a-20a] He again said on cross-examination that the only basis for the adverse recommendation was the time element. [20a]

The report of the hearing officer to the Attorney General does not appear in the file. [20a-21a]

The local board clerk testified that only the recommendation from the Department of Justice (a letter from the Assistant to the Attorney General) appeared in the file. The recommendation of the Attorney General merely referred to the report. [21a] The clerk testified about the recommendation of the Attorney General. It was read into evidence. [21a]

The recommendation of the Attorney General referred to the report of the hearing officer. [66a-68a] It confirmed the fact that Gonzales was "a sincere Jehovah's Witness" but concluded that his affiliation "with that sect has been too recent and too closely related to his draft status to warrant the acceptance of his conscientious objector position as genuine." [67a-68a] The Attorney General stated that Gonzales became a member of Jehovah's Witnesses in February 1950, one month after his registration in January 1950. He said that this was despite "the fact that his wife had been a member for many years," and that it "lends weight to this conclusion." [68a]

The recommendation of the Attorney General to the appeal board is dated December 1, 1952. It appears in the draft board file. [66a-68a] No notice of filing it was given to petitioner. The appeal board acted upon the recommendation without giving Gonzales an opportunity to answer the report and classified him in I-A on December 11, 1952. [41a, 69a] This made him liable for military training and service and denied his claim for exemption as a minister or classi-

fication as a conscientious objector. He was notified of this classification on December 15, 1952. [41a]

On December 21, 1952, Gonzales wrote to the State Director requesting a review of his case. [69a] On January 6, 1953, the local board transmitted his file to the State Director upon request of that official. [70a-71a] On January 13, 1953, the state director informed Gonzales and the local board that no action would be taken and no further review was permitted. [71a-72a]

On February 3, 1953, petitioner was ordered to report for induction on February 19. [41a, 73a] He reported on February 19, but refused to submit to induction. [41a, 77a-78a] He was reported to the United States Attorney as a delinquent. [41a, 76a] He was indicted for refusing to submit to induction. [2a]

History of the Action

The indictment charged that petitioner violated the Universal Military Training and Service Act by refusing to submit to induction. [2a]

On May 14, 1953, petitioner was arraigned. He pleaded not guilty. [1a] He waived the right of trial by jury on July 7, 1953, the date his trial began in the court below. The trial continued to the next day. The court heard evidence. At the conclusion of the evidence a motion for judgment of acquittal was filed. The court took the case under advisement and reserved decision on July 13, 1953. The court below on September 22, 1953, filed a memorandum opinion denying the motion for judgment of acquittal and finding petitioner guilty. [1a] The opinion is printed in the record. [81a-92a] The trial court sentenced petitioner on October 26, 1953, to the custody of the Attorney General for a period of three years and ordered him to pay a fine of $500.00. [1a, 93a]

A notice of appeal was timely filed. [94a] Motion for bail was denied by the trial court. [94a] Application for

bail pending appeal was made to the Court of Appeals and allowed by it. The record was duly filed and the case was fully argued, briefed and submitted to the Court of Appeals. [97a] The Court of Appeals on April 15, 1954, entered its judgment affirming the conviction. [97a] The clerk of the Court of Appeals has filed in this Court a certified copy of the printed transcript of the record. [1a-101a] This petition for writ of certiorari is timely filed in this Court.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred in holding that—

(1) Self-defense and willingness to use force to save his life was basis in fact for the denial of the conscientious objector status;

(2) Petitioner's late acceptance of his sincere conscientious objections was basis in fact for the denial of the exemption from participation in the armed forces;

(3) Petitioner's willingness to work in a defense plant was basis in fact for the denial of the conscientious objector status;

(4) Other members of Jehovah's Witnesses had gone into the armed forces and this may be considered as basis in fact for denial of the conscientious objector status;

(5) Failure to give the petitioner an opportunity to answer the adverse recommendation by the Department of Justice before classification by the appeal board was not a denial of procedural due process of law;

(6) The judgment of the trial court should not be reversed but affirmed.

REASONS FOR GRANTING THE WRIT

I.

Reliance upon the willingness of petitioner to use force to defend his life as basis in fact by the Court of Appeals [15a, 99a] is in direct conflict with *Annett* v. *United States,* 205 F. 2d 689 (10th Cir. June 26, 1953); *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. Dec. 7, 1953), certiorari denied 74 S. Ct. 532 (March 15, 1954); and *United States* v. *Pekarski,* 207 F. 2d 930 (2d Cir. Oct. 23, 1953); all holding that willingness to use force in self-defense or in defense of one's church is no basis in fact for a denial of the conscientious objector status. (See the opinion of Mr. Justice Douglas in granting bail on December 10, 1953, in *Clark* v. *United States,* 74 S. Ct. 357, 98 L. Ed. 171.) Because of this direct conflict on the same matter by the court below and the other courts of appeal, the Court should grant certiorari to settle the conflict.

Before concluding the discussion under this section of the discussion on the reasons for granting the writ it is important to call to the attention of the Court what the Acting Solicitor General said in his petition for writ of certiorari in *Taffs* v. *United States,* No. 576, October Term, 1953, at page 11:

> "We do not here seek review of the holding of the court below that the expressed willingness of the registrant and other Jehovah's Witnesses to use force, even to the extent of killing, in self-defense or in defense of home, family, or associates, does not of itself exclude them from the classification of conscientious objectors. The Department of Justice in its instructions to hearing officers for conscientious objector cases has taken the same position. See Appendix B, *infra,* pp. 20-24. See *Annett* v. *United States,* 205 F. 2d 689 (C. A. 10). Nor do we seek review of the determination that this particular registrant was sincere

in the beliefs expressed by him and a *bona fide* member of Jehovah's Witnesses."

II.

The holding by the court below that, notwithstanding that petitioner was a bona fide Jehovah's Witness and sincere in his objections to participation in war, he was not entitled to classification as a conscientious objector because he reached his conscientious objections too late [99a] is a holding that is in direct conflict with the holding of the Court of Appeals in *Schuman* v. *United States,* 208 F. 2d 801 (9th Cir. Dec. 21, 1953). In that case Chief Judge Denman said:

> "The length of time one has been connected with a faith has no bearing upon whether one is entitled to exemption as a conscientious objector. The only question to be considered is whether the registrant has a sincere (i.e., 'conscientious') religious opposition to participation in war in any form. The Hearing Officer concluded that Schuman was 'sincere in his religious belief' but because he had not been 'sincere' long enough [Footnote 10:] (Cf. Acts, Ch. 9) recommended that exemption be denied. This is but another example of relying upon suspicion rather than on affirmative evidence."

See also *United States* v. *Hartman,* 209 F. 2d (2d Cir. Jan. 8, 1954); *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. Dec. 7, 1953).

It is submitted that there is direct conflict on the same matter by the court below and the Court of Appeals for the Ninth Circuit. This conflict gives a ground for the granting of certiorari here to settle the conflict.

III.

The next ground for granting certiorari is that here is presented a very important question of federal law which has not been, but which ought to be, determined by this Court. It is whether willingness on the part of the thousands of conscientious objectors to indirectly participate in the war effort by doing work in a defense plant forfeits their exemption from direct participation in the armed forces.

The courts below held that they could lose their conscientious objector status if they worked or were willing to work in a defense plant. [84a, 85a, 100a] The petitioner says that, in the absence of an express authorization from Congress, the holding below was in error. The holding was judicial legislation rather than statutory construction.

The question is, therefore, very important because it involves the proper administration of the law by thousands of administrative officers affecting the rights of thousands of registrants throughout the entire United States. The case does not involve one person or one group of persons. But the rights of all conscientious objectors in the United States to do work of their own choice and keep their exempt status is involved under the act and the regulations. The nation-wide effect and the large class of persons affected by the ruling make the question extraordinarily important so as to command a review and determination by this Court.

The Department of Justice did not place great reliance on the fact that Gonzales was employed in the steel plant. But the trial court and the local board gave consideration to this fact. Gonzales said that his conscience was clear. Notwithstanding the type of work that he did, he was still conscientiously opposed to participation in war in the armed forces in any form.

Petitioner submits that the local board and the trial court have misinterpreted Section 6(j) of the act. The court below erroneously approved this. Congress never provided that the conscientious objections must be to "war in any form." (*Taffs* v. *United States*, 208 F. 2d 329 (8th Cir. Dec. 7,

1953), certiorari denied March 15, 1954, 74 S. Ct. 532). Congress did not hold that a conscientious objector who was not opposed to self-defense and employment in defense work was not a conscientious objector. It is direct participation in war in any form that is the subject matter of the statutory provision for the conscientious objector. Nothing whatever is said in the act or the regulations or in the legislative history that indicates anything to the effect that if a person is willing to do a certain type of work and indirectly participates in the war effort he cannot be considered a conscientious objector having conscientious scruples to direct participation in war in any form even though he was willing to indirectly participate by performing secular defense work as a means of employment. If the unreasonable interpretation placed upon the act by the trial court and the local board, which was adopted by the Court of Appeals, is accepted it will authorize an unending and uncontrollable forfeiture of bona fide conscientious objector claims. Every type of work and act that may be conceivably thought of remotely and indirectly contributing to the war effort can be relied upon to deny the conscientious objector status. This is contrary to the intent of Congress.

Congress did not intend to allow an inquest to be held as to the kind of work that a registrant did or was willing to do. Congress intended to protect every person who had conscientious objections based upon religious grounds to direct participation in war in any form. Congress did not make the factors relied upon by the trial court and the local board, which were approved by the Court of Appeals, as any basis in fact for the denial of the conscientious objector claim.

Neither the act nor the regulations make work that a person does that indirectly contributes to the war effort a criterion to follow in the determination of his conscientious objections. The sole questions for determination of conscientious objection are: (1) does the person object to participation in the armed forces as a soldier? (2) does

he believe in the Supreme Being? (3) does this belief carry with it obligations to God higher than those owed to the state? (4) does his belief originate from a belief in the Supreme Being and not from a political, sociological, philosophical or personal moral code?

Gonzales' case commands affirmative answers to all these questions. He fits the statutory definition of a conscientious objector.

It is entirely irrelevant and immaterial for the courts below to hold that there was basis in fact because Gonzales was willing to work in a steel plant. This was not an element to consider and in any event it was no basis in fact according to the law for the denial of his claim. It did not impeach or dispute in any way what he said in his questionnaire and conscientious objector form, all of which was corroborated by the FBI report.

The law does not authorize the draft board and the courts below to invent fictitious and foreign standards and use them to speculate against evidence and facts that are undisputed.—*Dickinson* v. *United States*, 346 U. S. 389 (Nov. 30, 1953); *Schuman* v. *United States*, 208 F. 2d 801 (9th Cir. Dec. 21, 1953); *Annett* v. *United States*, 205 F. 2d 689 (10th Cir.); *United States* v. *Alvies*, 112 F. Supp. 618 (N. D. Cal. S. D. 1953); *United States* v. *Graham*, 109 F. Supp. 377 (W. D. Ky. 1952); *United States* v. *Everngam*, 102 F. Supp. 128 (D. W. Va. 1951).

The question of employment and work performed by one who claims to be a conscientious objector becomes material only when the type of work willing to be done by the conscientous objector is direct participation of a combatant or noncombatant nature.

The Congress of the United States in passing the Universal Military Training and Service Act provided for two kinds of conscientious objectors. One is a person who has objections only to the performance of combatant service. He is recognized as willing to wear a uniform and do anything in the armed forces except kill or carry a gun. This

type of conscientious objector does not have his conscience questioned because of the type of work he is willing to perform even though it may be in the armed forces. No board or official of the government may deny a registrant his conscientious objector claim to the I-A-O classification (limited military service as a conscientious objector opposed to combatant military service only) because of his willingness to perform noncombatant service in the armed forces, thus helping the armed services do a job of killing.

It is submitted also that the conscientious objector to both combatant and noncombatant military service ought not be denied his conscientious objector classification because of the kind of work he is doing outside the armed services that indirectly contributes to the war effort. The law disqualifies no one on such ground. A reasonable interpretation of the act and the regulations would not make the type of employment that a registrant is willing to do relevant so long as it does not involve direct participation in combatant or noncombatant military service.

The tremendous importance of the question here discussed is best illustrated by a showing of how far the holding of the courts below, when given its logical extension, pushes conscientious objectors out from under the protection of the law. Should this interpretation of the statute be accepted as the law then an unreviewable engine of speculation, forfeiture and discrimination has been placed in the hands of the administrators of the law. They can forfeit the conscientious objector claim for the willingness of the conscientious objector to do anything the draft boards or the Department of Justice finds to contribute remotely to the war effort or which may be considered indirect participation. If such an interpretation be accepted then a conscientious objector who farms and produces food utimately used by the army, or who works on a railroad that carries troops or implements of warfare, or who pays his income taxes—over half of which is used to finance the armed forces and the defense effort of the nation—will be denied his exemp-

tion from direct participation in the armed forces. Then at last a ready device for evading the holding of this Court in *Dickinson* v. *United States*, 346 U. S. 389 (Nov. 30, 1954), has been found.

There are no other opinions discussing this question (except that of the trial court in this case) known to counsel for petitioner. The question was involved (but not discussed) in *Clark* v. *United States*, 74 S. Ct. 357, 98 L. Ed. 171. Mr. Justice Douglas said: "According to the papers before me he indicated that he was by religious training and belief opposed to participation in war but that he was willing to use force in defense of his family or his congregation and that he would work in a defense plant if in great economic need." He held that a substantial question was involved upon the appeal so as to permit bail.

It is submitted, therefore, that the question is of such great importance that the writ of certiorari should be granted so that it can be finally determined by this Court.

IV.

The holding of the court below that there was basis in fact is in direct conflict with *Schuman* v. *United States*, 208 F. 2d 801 (9th Cir. Dec. 21, 1953). (See also *Taffs* v. *United States*, 208 F. 2d 329 (8th Cir. Dec. 7, 1953), where the appellant was a latecomer to Jehovah's Witnesses.) In his petition for writ of certiorari the Acting Solicitor General told this Court that he did not question the sincerity of Taffs, and this statement was made notwithstanding that Taffs was also a latecomer to Jehovah's Witnesses and a very recent conscientious objector.—Also see *United States* v. *Hartman*, 209 F. 2d 366 (2d Cir. Jan. 8, 1954).

V.

The court below held that the procedural rights of petitioner were not violated when the appeal board considered and acted upon the adverse recommendation of the De-

partment of Justice. [100a] It was against the conscientious objector claim of petitioner. It was considered by the appeal board without giving him an opportunity to answer it before that appeal board made the final classification. This holding is in conflict with that of the United States Court of Appeals for the Fourth Circuit in *Brewer* v. *United States*, decided on April 5, 1954. In that case the court held that consideration by the appeal board of the secret FBI investigative report, inadvertently sent to the board by the Department of Justice, deprived him of due process of law. The court found that the registrant was denied the right to answer the FBI report before the appeal board. The court, however, said erroneously that a registrant was given the right by the regulations to see and answer the recommendation of the Department of Justice to the appeal board. Contrary to that statement are the regulations which do not grant the right. The holding by the court below on this point is also in direct conflict with *Degraw* v. *Toon*, 151 F. 2d 778 (2d Cir.), and *United States* v. *Balogh*, 157 F. 2d 939 (2d Cir. 1946), vacated 329 U. S. 692, and later affirmed 160 F. 2d 999 (2d Cir. 1947).

The holding by the court below [100a] that action on secret reports of a trial examiner or agency hearing officer without an opportunity to reply before final decision is made by the administrative agency is not a violation of due process of law conflicts directly with *Kwock Jan Fat* v. *White*, 253 U. S. 454, 459, 463, 464; *Morgan* v. *United States*, 304 U. S. 1, 22, 23; *Interstate Commerce Comm'n* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91-92, 93; *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274, 290: and *State of Washington* ex rel. *Oregon R. R. & Navigation Co.* v. *Fairchild*, 224 U. S. 510, 524.

In the case of *Morgan* v. *United States*, 304 U. S. 1, the Court said: "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon

its proposals before it issues its final command. No such reasonable opportunity was accorded appellants." (304 U. S. at page 19) Identically the same secret proposal was made here by the Department of Justice, and the appeal board acted upon it in this case without the knowledge of the petitioner in time to protect himself. This star-chamber procedure prescribed by the regulations is a denial of due process of law. It conflicts with the "fair and just" provisions of Section 1(c) of the act, *supra*, page 6, and the Fifth Amendment to the United States Constitution.

There is another ground for granting the writ. It is the denial of procedural due process, which is also a grave question of nationwide importance. The procedure followed in this case is not a single isolated instance of a denial of due process that will not be repeated. It is the required procedure followed and to be carried out in thousands of cases. It is fixed by Sections 1626.25 and 1626.26 of the Selective Service Regulations. (See this petition, *supra*, at pages 9-12.) Thousands, in fact, tens of thousands of conscientious objectors, and all the many draft appeal board members, in consideration of claims of conscientious objectors, are involved in the questioned procedure here. The question will continue to be urged to this Court in the future until it is settled by this Court. It is submitted, therefore, that in the event that no conflict is found to exist here this Court ought to exercise its discretion here, take jurisdiction and grant the writ because an important question of federal law which ought to be determined, but which has not been determined by this Court, is presented here. The writ should be granted and the law determined so that the thousands of persons affected by the operation of the law will know what their respective rights and duties are.

CONCLUSION

For the reasons above stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

May, 1954.